

HOUSE BILL NO. 409

INTRODUCED BY GOLIE, MCKENNEY, GEBHARDT, TROPILA, LANGE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WORKFORCE DRUG AND ALCOHOL TESTING PROGRAM; REVISING THE DEFINITION OF SAMPLE; REVISING THE CRITERIA FOR A QUALIFIED TESTING PROGRAM; AND AMENDING SECTIONS 39-2-206, 39-2-207, AND 39-2-209, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-2-206, MCA, is amended to read:

"39-2-206. Definitions. As used in 39-2-205 through 39-2-211, the following definitions apply:

(1) "Alcohol" means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.

(2) "Alcohol concentration" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an evidential breath test.

(3) "Controlled substance" means a dangerous drug, as defined in 49 CFR, part 40, except a drug used pursuant to a valid prescription or as authorized by law.

(4) "Employee" means an individual engaged in the performance, supervision, or management of work in a hazardous work environment, security position, position affecting public safety, or fiduciary position for an employer and does not include an independent contractor. The term includes an elected official.

(5) "Employer" means a person or entity that has one or more employees and that is located in or doing business in Montana.

(6) "Hazardous work environment" includes but is not limited to positions:

(a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees;

(b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or

(c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar substances.

(7) "Medical review officer" means a licensed physician trained in the field of substance abuse.

(8) "Prospective employee" means an individual who has made a written or oral application to an employer to become an employee.

(9) "Qualified testing program" means a program to test for the presence of controlled substances and alcohol that meets the criteria set forth in 39-2-207 and 39-2-208.

(10) "Sample" means a urine specimen, a breath test, blood, or oral fluid obtained in a minimally invasive manner and determined to meet the reliability and accuracy criteria accepted by laboratories for the performance of drug testing that is used to determine the presence of a controlled substance or ~~a breath alcohol test to determine the presence of alcohol.~~

Section 2. Section 39-2-207, MCA, is amended to read:

"39-2-207. Qualified testing program. A qualified testing program must comply with the following criteria:

(1) Testing must be conducted according to the terms of written policies and procedures that must be adopted by the employer and must be available for review by all employees 60 days before the terms are implemented or changed. Controlled substance and alcohol testing procedures for samples that are covered by 49 CFR, part 40, must conform to 49 CFR, part 40. For samples that are not covered by 49 CFR, part 40, the qualified testing program must contain chain of custody and other procedural requirements that are at least as stringent as those contained in 49 CFR, part 40, AND THE TESTING METHODOLOGY MUST BE CLEARED BY THE UNITED STATES FOOD AND DRUG ADMINISTRATION. At a minimum, the policies and procedures must require:

(a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful manufacture, distribution, possession, or use of a controlled substance;

(b) the employer's program for regularly educating or providing information to employees on the health and workplace safety risks associated with the use of controlled substances and alcohol;

(c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by employees;

(d) a description of available employee assistance programs, including drug and alcohol counseling, treatment, or rehabilitation programs that are available to employees;

(e) a description of the sanctions that the employer may impose on an employee if the employee is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is found to test positive for the presence of a controlled substance or alcohol;

(f) identification of the types of controlled substance and alcohol tests to be used from the types of tests listed in 39-2-208;

(g) a list of controlled substances for which the employer intends to test and a stated alcohol concentration level above which a tested employee must be sanctioned;

(h) a description of the employer's hiring policy with respect to prospective employees who test positive;

(i) a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute concerning test results;

(j) a provision that all information, interviews, reports, statements, memoranda, and test results are confidential communications that may not be disclosed to anyone except:

(i) the tested employee;

(ii) the designated representative of the employer; or

(iii) in connection with any legal or administrative claim arising out of the employer's implementation of 39-2-205 through 39-2-211 or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee may have caused or contributed to the accident; and

(k) a provision that information obtained through testing that is unrelated to the use of a controlled substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released to the employer.

(2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards of conduct, an employer may require an employee who tests positive on a test for controlled substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a condition of continued employment. An employer may require the employee to submit to periodic followup testing as a condition of the counseling, treatment, or rehabilitation program.

(3) Testing must be at the employer's expense, and all employees must be compensated at the employee's regular rate, including benefits, for time attributable to the testing program.

(4) The collection, transport, and confirmation testing of ~~urine~~ URINE samples must be performed in accordance with 49 CFR, part 40, AND THE COLLECTION, TRANSPORT, AND CONFIRMATION TESTING OF NONURINE SAMPLES MUST BE AS STRINGENT AS THE REQUIREMENTS OF 49 CFR, PART 40, IN REQUIRING SPLIT SPECIMENS AS DEFINED BY THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, REQUIRING TRANSPORT TO A TESTING FACILITY UNDER THE CHAIN OF CUSTODY, AND CONFIRMATION OF ALL SCREENED POSITIVE RESULTS USING

1 MASS-SPECTROMETRY TECHNOLOGY.

2 (5) Before an employer may take any action based on a positive test result, the employer shall have
3 the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An
4 employee or prospective employee must be given the opportunity to provide notification to the medical review
5 officer of any medical information that is relevant to interpreting test results, including information concerning
6 currently or recently used prescription or nonprescription drugs.

7 (6) Breath alcohol tests must be administered by a certified breath alcohol technician and may only be
8 conducted using testing equipment that appears on the list of conforming products published in the Federal
9 Register.

10 (7) A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 for a person
11 to be considered as having alcohol in the person's body."
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13 **Section 3.** Section 39-2-209, MCA, is amended to read:

14 **"39-2-209. Employee's right of rebuttal.** The employer shall provide an employee who has been
15 tested under any qualified testing program described in 39-2-208 with a copy of the test report. The employer
16 is also required to obtain, at the employee's request, an additional test of the ~~urine~~ split sample by an
17 independent laboratory selected by the person tested. The employer shall pay for the additional tests if the
18 additional test results are negative, and the employee shall pay for the additional tests if the additional test
19 results are positive. The employee must be provided the opportunity to rebut or explain the results of any test."

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